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William J. Kenealy, S.J.

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Readers who have followed this discussion between Professor Goble and Father Kenealy will welcome this article as a concise statement of the scholastic position on the natural law, together with a clarification of its concepts and terminology.

SCHOLASTIC NATURAL LAW— Professor Goble's Dilemma

WILLIAM J. KENEALY, S.J.*

PROFESSOR GEORGE W. GOBLE wrote a challenging and significant article, entitled *Nature, Man and Law: The True Natural Law*,¹ which was criticised by the present writer's *Whose Natural Law?*² To this criticism Professor Goble has replied in his *The Dilemma of the Natural Law*.³ The dilemma indicated in the title is expressed in the following words:

The universality and immutability of principles of law can either be determined by objective evidence or they cannot. If they can be so determined, the whole body of natural law becomes a system of *empirical* law. If they cannot be so determined, then objective evidence cannot be used to show the validity of one system over another claiming the same attributes. This is the dilemma of the natural law.⁴ (*Italics supplied.*)

The gist of my reply to this dilemma is that, conceding the second horn, I deny the first. The reason why I deny the first horn of the dilemma is because it assumes that objective evidence is confined solely to empirical data. It implies that we can have objective evidence only of *physical* facts adduced by the senses; and that we cannot have objective evidence of *metaphysical* truths perceived by the intellect. Since the physical sciences themselves depend upon the validity of certain metaphysical truths, Professor Goble's dilemma seems to be predicated upon a truncated scientism. Such an assumption is essentially inadequate, not merely for the philosophical and legal sciences, but also for the positive and physical sciences. I shall attempt to clarify the above analysis of Professor Goble's dilemma by the following commentary upon his reply to my criticism.

The substance of my criticism of Professor Goble's original thesis was stated in the following topical sentences:

*A.B. (1928), A.M. (1929), Boston College; Ph. D., Gregorian University (1932); S.T.L., Weston College (1935); LL.B., Georgetown University (1939); Professor of Law, Loyola University School of Law, New Orleans, La.; former Dean, Boston College Law School.

¹ Goble, 41 A.B.A.J. 403 (1955).

² Kenealy, 1 CATHOLIC LAWYER 259 (Oct. 1955).

³ Goble, 2 CATHOLIC LAWYER 226 (July 1956).

⁴ *Id.* at 232.

Professor Goble sets up and rejects a concept of natural law which would also be repudiated by every classicist from Thomas Aquinas to Heinrich Rommen. By "classicists" I mean the scholars and spokesmen of the traditional natural law philosophy as expounded by the medieval scholastics and the modern neo-scholastics. The concept rejected by Professor Goble differs essentially from the classical concept in two fundamental and all-pervasive aspects: the very meaning of the natural law, and its epistemological basis.⁵

In his reply, however, Professor Goble states "... the primary target of my criticism was the natural law which developed in Europe in the 17th and 18th centuries and was transported to the United States in the 18th and 19th centuries. Dean Pound called this the 'classical natural law.'"⁶ He asks, "Who is to say what is the *classical* natural law?", and asserts, "Father Kenealy described another system called natural law, and then took great pains to show that my criticism had no application to it, and further that since it did not, it is obvious that I do not understand his system."⁷

Professor Goble has a good *ad hominem* point here — but only if and insofar as his arguments were aimed exclusively at his "primary" target, the seventeenth-century and eighteenth-century natural law, which Dean Pound described and called classical. But the Professor's arguments were not so confined to his "primary" target. He discharged a blunderbuss which scattered shot at a more important and enduring target, the traditional scholastic natural law, which I termed classical.⁸ This seems fairly clear

from the tenor of his original article, and from the following statement in his reply:

Father Kenealy's system, *as well as the system described by Pound*, encompasses what are called "fundamental principles" which are said to be "certain, immutable and universal," and which are "antecedent, both in logic and in nature, to the formation of civil societies." To the extent that Father Kenealy's system incorporates this view it seems to me to be vulnerable to *at least some of the criticisms set forth in my article*.⁹ (Italics added.)

Professor Goble expresses gratification at my statement that his arguments have "considerable relevance to the 'natural law' theories of Pufendorf, Thomasius, Hobbes, Spinoza and their followers of the seventeenth and eighteenth centuries."¹⁰ Nevertheless, his reply reinforces my conviction that he misses the meaning and the epistemology of the traditional scholastic natural law.

I. THE MEANING

1. Referring to the *fundamental* principles of the natural law, which are certain, universal and immutable, I had recited the familiar doctrine that they "are generally divided into a *primary* principle and its immediate specifications, called *secondary* principles. The primary principle is usually phrased in such terms as 'What is good is to be done, and what is evil is to be avoided.'"¹¹ Commenting on this primary principle, Professor Goble stated:

If we define "good" in general terms, that and Romans through the medieval scholastics to the modern neo-scholastics. This traditional school still seems to me more deserving of the term "classical" than its seventeenth- and eighteenth-century off-shoots which perpetrated the various "state of nature" theories.

⁹ Goble, *The Dilemma of the Natural Law*, 2 CATHOLIC LAWYER 226, 228 (July 1956).

¹⁰ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 261 (Oct. 1955).

¹¹ *Id.* at 262.

⁵ Kenealy, *supra* note 2.

⁶ Goble, *supra* note 3.

⁷ Goble, *supra* note 3, at 227.

⁸ I did so instinctively, I suppose, because of the ancient and unbroken development and tradition of the *philosophia perennis* from the ancient Greeks

is, without reference to particular acts, we would have to say something like this, "good is what one ought to do." But if we do that, the principle becomes tautological, *i.e.*, "one ought to do what one ought to do." This can hardly be said to be a principle at all.¹²

But this is not the meaning of the primary principle. The misconception lies in the confusion of "good" and "ought." There are many morally good acts which are *not* morally obligatory. There are works of supererogation. Heroic acts of charity are among the more conspicuous examples. Surely, Professor Goble is not morally obliged to perform all possible morally good acts within his power of choice. The concept of "good" and the concept of "obligation" must be sharply distinguished. The former means *suitability* to being or nature; the latter means *necessity* to end or destiny. Generically, the morally good act means a free act conformed to rational nature, perfective of human nature adequately considered (and therefore conducive to that nature's end); the morally evil act means a free act difformed from rational nature, degrading to human nature adequately considered (and therefore repulsive to that nature's end). By human nature "adequately considered" is meant the operative human being, considered in the light of the internal harmony of his faculties and the external harmony of his relations to his Creator and his fellow creatures. By the end of human nature is meant the fulfillment or perfection of human *being*. By obligation is meant the determination or moral necessity to that end.

Therefore, while the primary principle prohibits all evil acts, because they are necessarily repugnant to the end, it does not command all good acts, because, although

all are conducive, not all are necessary to the end; but it does command all good acts *ontologically* necessary to the attainment of the end of man. The point is that "good" and "ought" are neither identical in concept nor coextensive in predication. The universality and immutability of the principle emanates from the ontological universality and immutability of human nature and the ontological relation of human acts to human destiny. The certain *knowledge* of the principle is an epistemological matter which I shall attempt to discuss later. It strikes me as extremely significant, however, that Professor Goble's formulation of the principle, by identifying the "good" and the "ought," seems to indicate that he accepts as obvious and evident (and, logically, also as universal and immutable) that "good ought to be done and evil avoided." If he does not, what would the reason be for doubt, exception or change?

2. In discussing the *secondary* principles of the natural law, I had said:

As immediate specifications of the primary principle, the secondary principles find familiar expression in the (still general) terms of the Decalogue. The secondary principles share the certainty, universality and immutability of the primary principle.¹³

To which Professor Goble replied:

Suppose we consider the Commandment "Thou shalt not kill." Notwithstanding the literally clear, unqualified and unconditional statement of this injunction, one may justifiably kill another in self defense, in defense of his family, or even in defense of a stranger. . . . These are generally recognized exceptions to the mandate "Thou shalt not kill." But these exceptions are in no sense "derived" from the rule, as Father Kenealy seems to suggest. An exception which per-

¹² Goble, *supra* note 9, at 229.

¹³ Kenealy, *supra* note 10, at 262.

mits killing cannot be "derived" from a rule which says the exact opposite.¹⁴

I do not wish to substitute adjective for argument. But I am compelled to say that this is a fantastic interpretation of a secondary principle of the natural law. It could not have been suggested by any scholastic treatise or manual. It is based upon a verbalism utterly alien to scholastic thinking. It might make one wonder why Professor Goble does not consider the swatting of a mosquito or the plucking of a bluebell as an "exception to the mandate." The cited "exceptions" are not exceptions at all to the scholastic principle. I had used the expression, "the (still general) terms of the Decalogue," advisedly. The four monosyllables, "Thou shalt not kill," merely indicate the principle. The principle, in its *negative* aspect, prohibits the *immoral* killing or infliction of bodily harm upon self or other human beings. In its *positive* aspect, it commands the preservation of life and bodily integrity of self and other human beings. As a verbal formulation of the negative aspect, I would suggest "Thou shalt not kill or inflict bodily harm upon any human being *unjustly*."

Wherefore, acts of self-defense, defense of others, warfare, executions for crime, corporal punishment, anesthesia, surgery, vaccination, strenuous sports, and all other bodily harms or risks of the same, *which are justifiable*, are not exceptions to the principle. They are outside its prohibitions; in fact, they may be within its commands. And the justification of the act will depend upon the norm of morality, *i.e.*, conformity with or difformity from human nature adequately considered, and as specifically determined by the nature of the act, the circumstances

of the action, and the motive of the actor. This is not to say or suggest that the determination of such moral problems is easy or automatic. I had stated in my criticism of Professor Goble's original article:

That natural law does not mean a closed legal system, is evident from the fact that the fundamental principles do not tell us automatically in *concrete* applications what is good or evil, just or unjust, wise or unwise; what is idolatry, murder, theft, adultery, perjury or calumny.¹⁵

Hence, it is quite true that the solution to a question of justifiable self-defense is not "derived" or deduced *a priori* from the principle which demands justification for the slaying of another. The solution of such problems is what gives rise to the science of morality — just as the difficulty of applying principles (and rules) of law gives rise to the science of law. Surely it is not true that a principle (or even a rule) is meaningless or useless because its application may be difficult in particular cases. The phrase "due process" indicates a legal principle (declaring and enforcing a natural law principle) of great difficulty in particular cases. But to me it is of great meaning and moment that the moral law, which says I may not be deprived of life *unjustly*, is recognized and enforced by the civil law, which says I may not be deprived of life *without due process* — and this despite the fact that, in close cases, men and judges of reasonable but finite mentalities, may differ about the application of justice and due process. General principles may not decide particular cases; but particular cases cannot be decided without them.

A possible clue to Professor Goble's misunderstanding of natural law principles may lie in his use of the terms "principle" and

¹⁴ Goble, *The Dilemma of the Natural Law*, 2 CATHOLIC LAWYER 226, 230 (July 1956).

¹⁵ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 262 (Oct. 1955).

"rule" interchangeably. He argues that principles of natural law cannot be universal or immutable, because rules of civil law obviously are not.¹⁶ The argument is a *non sequitur* because the terms do not mean the same thing. A principle of natural law *can be known* by man, because he can know his own nature and essential relations; but the principle *cannot be made*, changed or destroyed by man, because he cannot make, change or destroy his essential nature; wherefore a principle of the natural law is universal and immutable as the essential nature from which it emanates. But a rule of civil law *must be made*, and may be changed or abrogated by man's legislative or judicial process; wherefore a rule of the civil law lacks the universality and immutability of a principle of the natural law. This is the reason why civil law enactments and rulings *should be* consonant with principles of natural law; it is why the natural law constitutes a norm to measure the justice or injustice of civil law.

Professor Goble cites, among others, the rule of consideration in the law of Contracts;¹⁷ I might add, to spread the field, the rule of hearsay in Evidence, the rule of witnesses in Wills, the rule of recording in Property, the rule of strict liability in Torts, the rule of "retreating to the wall" in Crimes, the rule concerning self-incrimination in Constitutional Law, and many others, from the rules governing statutes of limitations all the way down to traffic rules and minor procedural regulations. As rules, they have generality; but they are also subject to exceptions properly so called; and they may require change, gradual or drastic, as time and wisdom demand. For they are practical

and subsidiary means, of more or less efficiency, to enable government to apply the great principles of the natural law to human beings who live in the constantly changing political, economic and social conditions of civil society.¹⁸

3. A similar misunderstanding seems to color Professor Goble's notion of the absolute and inalienable *rights* involved in the philosophy of the natural law. I had stated in my article:

Natural law does indeed imply the existence of some human rights which are absolute and inalienable, such as the right to life, worship, marriage, property, labor, speech, locomotion, assembly, reputation, etc. These are absolute in the sense that they derive from human nature; they are not mere hand-outs from the state; the state is bound to protect them and cannot destroy them even though, by physical force, the state has sometimes prevented their exercise. They are *not* absolute in the sense that they are unlimited in scope. It is a commonplace in classical natural law philosophy that human rights, even the most fundamental mentioned above, are *limited*. They are limited in the sense that they are subject to specification, qualification, expansion and contraction, and even forfeiture of exercise, as the equal rights of others and the demands of the *common good* from circumstance to circumstance, and from time to time, reasonably indicate. Human rights are absolute only in the sense of the minimal requirements of a just and ordered liberty. But this

¹⁶ Goble; *supra* note 14, at 228-236.

¹⁷ Goble, *supra* note 14, at 231.

¹⁸ Cf. Fagan, *The Goble-Kenealy Discussion - Two Comments*, 2 CATHOLIC LAWYER 324 (Oct. 1956). Professor Fagan seems to have missed the context of my statement that some derivative principles do not "share in the certainty, universality and immutability of the fundamental principles." Taken *sensu composito*, some derivatives plainly do not have the certainty *quoad nos*. Moreover, I was refuting the notion that natural law involved a "closed legal system," indicating that many positive principles and practical rules, constructed under the philosophy of the natural law, would obviously not be certain, universal or immutable.

is not the stuff of a closed system of immutably "attained perfection".¹⁹

To which Professor Goble replied:

It is simply linguistic gymnastics to say in one breath that a principle is "certain, universal and immutable" or that a right is "absolute," and in the next that it is, nevertheless, subject to "qualification," "expansion," "contraction" or "forfeiture." "Qualification" and "contraction" include "exception," and an "exception" is an actual subtraction from the rule. Each exception reduces the scope of the rule by the amount of the exception, and therefore makes it apply to fewer situations. By any reasonable definition this is a change in the rule itself. ... It seems to me that Father Kenealy has paid a terrific price in semantics to make it possible to say that his fundamental principles are "certain, universal and immutable." ²⁰

This reply confuses not merely principles with rules, but both with rights. I stated that the fundamental principles of the natural law are certain, universal and immutable; but I have never so described rules or rights. A right is neither a principle nor a rule. Generically, a *right* is an individual's moral power to act, to omit, or to exact something of another. It is a *legal right* when that power is granted, or recognized as existing, by the civil law. It is a *natural right* when that power emanates from human nature itself, *i.e.*, from essential human personality and destiny. Obviously, then, a right may be both natural and legal. Now, I said that natural rights "are *absolute in the sense* that they derive from human nature, they are not *mere* hand-outs from the state;" and that the state "cannot destroy them," because the state is unable to destroy the nature from which they emanate; and that

the state "is bound to protect them," because it is for the purpose of securing these rights that governments are instituted among men. Nevertheless, I also said that natural rights, which are absolute in the sense explained, are *limited in scope*, "*in the sense* that they are subject to specification, qualification, expansion and contraction, and even forfeiture of exercise . . ." To Professor Goble, this distinction is "simply linguistic gymnastics."

They have blown the whistle on my athletic days, but I do not think that the distinction requires particular agility, semantic or otherwise. I shall attempt to illustrate some typical limitations upon absolute natural rights. *Life*: may be forfeited by just conviction of a capital crime, although even then it would be retained as against private necktie parties. *Worship*: may be qualified by reasonable restrictions as to time, place and circumstance, and hence I may justly be prevented from celebrating Mass when and where I would block the necessary flow of traffic, *e.g.*, in the middle of Times Square. *Marriage*: may be specified and qualified by reasonable restrictions as to age and consanguinity, etc.; but not, I believe, by so-called miscegenation statutes, which seem to me repugnant to the essence of the natural right. *Property*: may be qualified, contracted or expanded by reasonable zoning laws, anti-trust regulations, wage and hour legislation, etc. *Labor*: may be specified and qualified by reasonable professional licensing requirements, sanitary regulations, wage and hour and conditions-of-work legislation, etc. *Speech*: may be qualified by reasonable restrictions necessary, at least in time of grave emergency or catastrophe, for the common good. *Locomotion*: may be specified, contracted or expanded by reasonable passport rules, immigration laws,

¹⁹ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 263-64 (Oct. 1955).

²⁰ Goble, *The Dilemma of the Natural Law*, 2 CATHOLIC LAWYER 226, 231-32 (July 1956).

etc.; and I do not mean the "national quota system." *Assembly*: may be qualified by reasonable requirements in the interest of public health, safety and order. *Reputation*: may be qualified by reasonable laws requiring testimony in public trials, disclosure of embarrassing but contagious diseases, etc. These are simply random examples of limitations upon the scope of the absolute natural rights which I had enumerated; but they are typical of the limited scope which is an attribute of all natural rights.

Is this "linguistic gymnastics?" I think not. If the scope of natural rights were subject to *unreasonable* or arbitrary limitation, either by the fiat of a dictator or the majority vote of a democracy, then indeed they would be subject to simple extinction and could *not* be said to be absolute. But natural rights still exist in Budapest, no matter how their exercise is frustrated by civil law and brute force, because the Hungarians are still human beings. If, however, the scope of natural rights is subject only to *reasonable* limitation for the sake of the common good, then indeed they are not subject to simple extinction and can *properly* be said to be absolute. Reasonable limitation of scope is a "built-in" attribute of natural and inalienable rights.

For the human person, in his essential nature, is not merely an *individual being*, he is also a *social being* living with his fellows in an external society which is subject to political, economic, technological and social change. Hence, his natural rights (and, of course, obligations) are both individual and social. To consider him solely as an individual would lead to anarchy; to consider him solely as a social unit would lead to totalitarianism. But his individual-social nature *adequately* considered leads to the conclusion that his natural rights are abso-

lute, in the sense explained, because he is an individual for whose good governments are instituted; and to the perfectly compatible conclusion that his natural rights are limited in scope, in the sense explained, because he is also a social person obliged by nature to contribute to the common good.

4. I had asked Professor Goble: "*What* representative natural law philosopher or spokesman held the principle that 'by natural law, freedom of contract could not be interfered with by legislation'?"²¹ To which he replied:

This is a loaded question, because if I name such a person, all Father Kenealy need do is to say that my selection is not a "*representative*" natural-law philosopher and he will not be representative because he takes that view. There were certainly a number of judges who claimed to be natural-law lawyers who held to the theory of the inviolability of freedom of contract. Justices Chase, Field, Miller and Brewer may be mentioned as among those who at various times took this view. These judges were representatives of the natural law of the nineteenth century, if not of the natural law of Father Kenealy.²²

I had also asked Professor Goble: "... [*W*]hat fundamental principle, *what* principle held to be certain, universal and immutable has been relinquished at any time by devotees of the classical natural law?"²³ To which he replied:

This question is also impossible to answer to Father Kenealy's satisfaction, because any person I might name as having relinquished a fundamental principle of natural law would by such relinquishment disqualify himself as a "devotee" of Father Kenealy's classical natural law. . . . In relation to this question I would like to propose the name of Judge Robert N. Wilkin as one who meets

²¹ Kenealy, *supra* note 19, at 263.

²² Goble, *supra* note 20, at 232.

²³ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 262 (Oct. 1955).

all of Father Kenealy's requirements for a classical natural-law lawyer.²⁴

From these two replies, it would seem that Professor Goble is somewhat wary of my *cauda Jesuitica*. Unnecessarily, I trust. The two questions were rhetorical, I suppose, but they were not "loaded." The rhetoric expressed my conviction that no recognized scholastic philosopher, or representative spokesman for scholastic natural law philosophy, has ever taken the positions indicated. But had Professor Goble surprised me by naming a philosopher or spokesman in point, I trust that I would have the candor to admit it. I am interested in the philosophy, which is quite independent of the aberrations of any particular philosopher. We have sharpened the focus of our controversy to the point where the *laissez-faire* nineteenth-century rugged individualism of Justices Chase, Field, Miller and Brewer are not in issue. There remains the case of Judge Wilkin to consider.

Judge Wilkin is listed by Harold Reuschlein²⁵ as a neo-scholastic. He wrote the opinion in *Hayes v. Crutcher*,²⁶ which Professor Goble describes as follows:

In 1952, Judge Wilkin wrote a judicial opinion in which he stated that since it is contrary to nature for black birds, white birds, red birds and blue birds to roost on the same limb of a tree, it is contrary to natural law for colored persons to have a right to the use of a public golf course which by city ordinance was limited to white persons. "It seems" said the judge, "that segregation is not only recognized in constitutional law and judicial decision, but that it is also supported by general principles of natural law."²⁷

Without consciously deviating from my

protestations of candor in controversy, and despite Harold Reuschlein's listing, I do not think that Judge Wilkin qualifies as a scholastic philosopher or as a spokesman for that philosophy.²⁸ However, for the sake of the point in issue, let us suppose that he does. What follows? I still ask "*What* fundamental principle, *what* principle held to be certain, universal and immutable has been relinquished" by Judge Wilkin? Although he stated that, in his opinion, segregation was "*supported* by general principles of natural law," he was obviously making a particular application of the principles (which he did not name or describe) to a concrete case. But I had already said:

Natural law philosophers agree on the fundamental principles of the natural law; they differ on its derivative principles and standards; and there is wide divergence of opinion as to the concrete applications of its derivative principles and standards to the constantly changing political, economic, social and legal conditions of human society. But what do such differences prove? Surely not the invalidity of the fundamental philosophy. Such differences prove that the area of opinion is larger than the area of certainty. . . .²⁹

In fairness to Judge Wilkin, it should be recalled that he wrote his opinion in 1952 as the judge of a lower federal court before the Supreme Court overruled *Plessy v. Ferguson* in the *School Segregation Cases*. Nevertheless, it is unfortunate that his *dicta* about birds attempted to link natural law to segregation on golf courses. The answer to Judge Wilkin seems to be that men are not birds, and birds do not play golf. It would be diverting, if somewhat startling,

²⁴ Goble, *The Dilemma of the Natural Law*, 2 CATHOLIC LAWYER 226, 233 (July 1956).

²⁵ Cf. REUSCHLEIN, JURISPRUDENCE 391 (1951).

²⁶ 108 F. Supp. 582 (M.D. Tenn. 1952).

²⁷ Goble, *supra* note 24.

²⁸ That Dean Reuschlein agrees with Father Kenealy is evident from his comment on Judge Wilkin's opinion in the Hayes case. 2 CATHOLIC LAWYER 234 (July 1956).

²⁹ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 265 (Oct. 1955).

to imagine the logical conclusions from a premise that men should act like birds. It appears that the Judge's argument about the instinctive actions of our feathered friends has no relevance to the rational conduct of human beings at all, but is strictly for the birds. My own opinion about the application of natural law to the issue of compulsory racial segregation is expressed elsewhere in these pages.³⁰

II. THE EPISTEMOLOGY

1. The epistemology³¹ of scholastic philosophy constitutes another stumbling block for Professor Goble. It is something quite mysterious. I had made the following statement:

I infer that Professor Goble believes that the epistemological basis of natural law philosophy is: *the criterion of truth is subjective certitude or sincerity of subjective conviction*. This is simply not true. . . . On the contrary, natural law philosophers unanimously set up *objective evidence* as the criterion of truth. The philosophers of various theories of *subjectivism*, Descartes, Spinoza, Leibnitz, Berkeley, Hume and their followers are again the express epistemological adversaries of classical natural law.³²

To which Professor Goble replied:

These positive assertions by Father Kenealy that immutable and universal principles of natural law are established by "objective evidence" are mystifying. I know of no scientific means, or trial and error procedures by which principles of law can be determined to be immutable and universal. How can it be established by objective evidence that principles are good or bad for society if we must accept them as immutably created before there was any society?³³

³⁰ Kenealy, *Segregation—A Challenge to the Legal Profession*, 3 CATHOLIC LAWYER 37 (Jan. 1957).

³¹ Epistemology is the science of the methods and grounds of knowledge, especially with reference to its limits and validity.

³² Kenealy, *supra* note 29, at 264.

³³ Goble, *The Dilemma of the Natural Law*,

I had stated that "natural rights and obligations are *inalienable* precisely because they are God-given. They are antecedent, both in logic and in nature, to the formation of civil societies."³⁴ Which drew this response:

The proposition that certain legal principles are "antecedent, both in logic and in nature, to the formation of civil societies" seems to assume that the mind can reason without experience — that it can by deductive logic reach conclusions about how men ought to conduct themselves in society, before society exists, and therefore before there are facts upon which reasoning can be based. Psychologists, I believe, would deny this. The mind cannot create knowledge. It cannot think in a vacuum.³⁵

Analyzing the above two quotations, and their cited contexts, it seems to me that Professor Goble is committed, explicitly or implicitly, to the five following propositions: a) That the immediate evidence, of the fundamental principles of the natural law, *assumes* "that the mind can reason without experience." b) That the antecedence "in logic and in nature," of inalienable rights to the formation of civil societies, necessarily means antecedence in *time* "before society exists." c) That the *only* evidence constituting the criterion of truth is that specific to the "scientific means, or trial and error procedures" of the positive and physical sciences. d) That such procedures are *competent* to determine whether or not the fundamental principles of the natural law — commanding good and prohibiting evil, forbidding unjust killings and the like — are, as principles, "good or bad for society." e) That such procedures are *competent* to test the validity of the ultimate and necessary

2 CATHOLIC LAWYER 226, 228 (July 1956).

³⁴ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 260 (Oct. 1955).

³⁵ Goble, *supra* note 33, at 229.

metaphysical premises of the positive and physical sciences themselves. I shall attempt to indicate why I think these five propositions are erroneous.

a) It is a fundamental axiom of scholastic epistemology that "*nihil est in intellectu nisi prius aliquo modo in sensu*," that is, nothing can exist in the mind which has not been previously in some manner in the senses. Wherefore, a man who has never seen cannot conceive a proper idea of color; a man who has never heard cannot conceive a proper idea of sound; and a man who had never experienced any sensation, internal or external, could not have any intellectual idea at all. It is certainly true that the mind cannot "create knowledge" or "think in a vacuum."

Nevertheless, the senses supply only particular and material data, whereas the intellect can abstract from such data ideas which are universal and spiritual, *e.g.*, the idea of being, nature, end, relation, act, potency, good, evil, right, obligation, principle, controversy, premise, argument, conclusion, etc. Such universal ideas do not exist, *as universals*, independently of an act of the intellect; but they have a foundation in objective reality, because they represent reality as abstracted from particular objects which do exist independently of an act of the intellect. But the intellect can do much more than apprehend ideas, it can also reflect, compare, reason, and form judgments; judgments do not exist, *as judgments*, independently of an act of the intellect; but, because they are predications of *objective reality*, they will be true or false insofar as they do or do not conform to the reality of the object existing independently of the act of judging. Hence, the criterion of truth (and the motive of certitude) can only be *objective evidence*, which may be defined as

the *manifestation*, to the judging intellect, of the ontological *necessity* of the object to be what it is. Accordingly, as the ontological necessity of the object is metaphysical, physical or moral, the truth (and certitude) of the judgment will be metaphysical, physical, or moral. Moreover, as the manifestation of that necessity does or does not depend upon some previously known truth, the objective evidence involved will be *mediate* or *immediate*. For knowledge must begin somewhere. And all knowledge, both speculative and practical, must depend upon some immediately evident truths. Otherwise we could never know anything, even probabilities. But we certainly do know some things.

The scholastic doctrine, therefore, that the fundamental principles of the natural law are objectively and immediately evident, does *not* "assume that the mind can reason without experience." It does not assert that such principles are the first truths known by men. It merely recognizes that such principles constitute the basis upon which all truths of the *practical moral order* ultimately depend.

b) Antecedence "in logic and in nature" does not necessarily mean antecedence in time "before society exists." Antecedence means priority: *in logic*, priority of premise to conclusion; *in nature*, priority of cause to effect; *in time*, priority by the calendar or clock. Inalienable natural rights are antecedent in logic to society, because we argue from what man's nature is to what society should be; we do not argue from what society is to what man's nature should be. Inalienable natural rights are antecedent in nature to society, because man's nature and natural activities are the cause of society, *sc.*, material, formal, efficient and final; man makes society, society does not make man. It is "to secure these rights" that "govern-

ments are instituted among men;" the Hungarians appreciate this. As to time, whether man ever existed in a "state of nature," as the seventeenth and eighteenth century philosophers seem to have held, *i.e.*, "before society" existed, is disputed by most scientists; but is completely immaterial to scholastic doctrine and to my argument.

c) Nor is the evidence specific to the "scientific means, or trial and error procedures" of the positive and physical sciences the *only* evidence constituting the criterion of truth. Such procedures, and their specific evidence, have reference to the formal objects of such sciences, *sc.*, what *is* in the positive and physical order. But we also know some things about the normative and metaphysical orders; we know something about truth itself, about freedom, faith, hope, love, prudence, justice, temperance, fortitude, sacrifice, patriotism — which are not the least components of the "good life" of men and their societies. They are also the objects of knowledge and, therefore, have their *own* objective evidence.

d) Nor are such procedures *competent* to determine whether or not the fundamental principles of the natural law — commanding good and prohibiting evil, forbidding unjust killings and the like — are, as principles, good or bad for society; because the positive and physical sciences are not normative. They study the "is" and not the "ought;" they prescind from "values." They bring to light extremely important positive and physical data which, however, must be evaluated by the normative and metaphysical sciences.

e) Nor are such procedures *competent* to test the validity of the ultimate and necessary metaphysical premises of the positive and physical sciences themselves. Among

such premises are: the principle of *contradiction*, that a thing cannot be and not be at the same time under the same aspect; the principle of *sufficient reason*, that whatever exists must have a sufficient reason for its existence; the principle of *causality*, that whatever exists contingently, or begins to be, must have a cause of its existence; the existence of *objective reality* independent of the human intellect; the *capacity* of the intellect to know some reality; the *difference* between truth and error, between certitude and probability, etc. These are metaphysical truths necessarily *presupposed* by the positive and physical sciences for the validation of their own procedures and conclusions; they are above and beyond the self-imposed formal objects of such sciences. Moreover, such premises cannot be "proved," in the sense of proceeding from the *known to the unknown*, because they are *immediately evident*; because the very attempt to "prove" them supposes their truth — just as Professor Goble cannot "prove" to himself that he exists, because any effort to do so would suppose his existence. Nevertheless, such metaphysical premises are the starting points of all human knowledge. Every forward march of science presupposes them, and none can "prove," disprove or change them. For, when properly understood, they are, objectively and immediately evident as certain, universal and immutable truths.

The metaphysical truths indicated above are among the first principles of the *speculative order*; the fundamental principles of the natural law are the first principles of the *practical order*. This distinction is one of convenience made because the same intellect can know and reason about essences, causes and effects, the "is" of necessary being, *i.e.*, truths which are positive or specu-

lative; and it can also know and reason about conduct, means to ends, the "ought" of physically free human actions, *i.e.*, truths which are normative or practical. The primary principle of the natural law is the basic truth of the practical moral order, which is supposed by all other truths of the same order, and upon which their validity depends. It is not known "without experience," nor is it the first truth known by the intellect. For the intellect, considering man's rational nature, his capacity for action, the conformity ("goodness") of some acts to that nature, the difformity ("badness") of other acts from that nature, the fulfillment or perfection which is the end of that nature, the necessity of attaining that end, the possibility of frustrating the end, the relation of attainment between good acts and the end, the relation of frustration between bad acts and the end, and the fact of the physical freedom of man in action — considering such things, the intellect cannot help but *see* that man, although physically free, is nevertheless morally obliged ("ought") to do good and avoid evil.

The above sentence, of course, is not an attempt to "prove" the primary principle. Any such attempt, in the sense of moving from the *known to the unknown* "ought," would be impossible; because it would necessarily presuppose some logically prior "ought," but no logically prior "ought" can be adduced, because there is none. The positive and physical sciences obviously cannot adduce one, since they are concerned exclusively with the "is;" and no one can get an "ought" in front of a microscope or a telescope. All men accept the primary principle; none deny it. I am sure that Professor Goble does not. For all men, no matter how violently they may differ upon its application

to particular acts or concrete fact situations, agree upon the basic truth that good should be done and evil avoided. Its denial would make futile any discussion of the moral order, of good and evil, justice and injustice, rights and obligations, due process and equal protection, etc. Its denial, in fact, has been incorporated into the *insanity* tests of civilized criminal codes. And this is because the primary principle, again when properly understood, is objectively and immediately evident as a certain, universal and immutable truth.

2. These qualities of the primary principle of the natural law are equally attributable to its immediate specifications, the secondary principles, *e.g.*, that one should not unjustly kill another. Professor Goble, however, asks:

Assuming that a principle has always been *good* and always will be good, how can that fact be proved presently by "objective evidence"? The only *basis* for a belief in the validity of a principle before or after the date of its verification by *evidence* is *probability*. . . . To the extent that we project a principle forward or backward beyond this point of time, we rely solely on *faith*, but not on objective evidence. . . . Science limits itself to stating its laws as probabilities or plausibilities, and not as absolutes, universals or immutables.³⁶ (Italics supplied.)

Sincerely desiring not to be captious, it is my turn to find Professor Goble's terminology "mystifying." In the quotation above, the "basis" for assent to a principle is variously referred to as "evidence," "probability" and "faith." Faith I shall deal with later; evidence is obviously the basis for assent; but probability is never the basis for assent. Probability and certitude are both *qualities* of assent, which are determined by the qual-

³⁶ Goble, *The Dilemma of the Natural Law*, 2 CATHOLIC LAWYER 226, 228-29 (July 1956).

ity of the evidence upon which the assent is based. Moreover, although the *possession* and *use* of truth is "good," it seems confusing to refer to principles as "good" or bad, rather than as true or false. Because "goodness," as the object of the will, is a quality of actions, whereas "truth," as the object of the intellect, is a quality of judgments; and principles are judgments. Hence, if I am asked how a perennially true principle can be proved presently by objective evidence, I must reply: If it is a fundamental principle, either in the speculative or in the practical order, it can never be "*proved*" or "*disproved*" in the past, present or future; it can be *seen*, however, at any time, in the light of its own *immediate* objective evidence. If it is a non-fundamental principle, it can be proved provided there is sufficient light from *mediate* objective evidence, and the method of proof will be deductive, inductive, or a combination of both. And because truth is objective and our minds are finite, there are many truths which we do not now, and never will, in this life at least, know or prove. But, because truth is objective, *whatever* we do or will know will be known by objective evidence.

The context of the above quotation stresses the fact that the "science" of Professor Goble is positive science to the exclusion of normative science. Hence, ignoring the latter which deals with the moral order, he argues from the former which, by the self-denial of its formal object, has nothing to do with the subject matter of the present controversy.

3. Nevertheless, Professor Goble's references to "faith" as the "basis" of assent to a principle is intriguing. He repeats the idea as follows:

My argument is based on the premise that the qualities of "universality" and "immut-

ability" of *rules* cannot be proved by objective evidence. The existence of these properties can be based *only upon faith*.³⁷ (Italics supplied.)

Assuming that he does not mean Divine Faith, which would be irrelevant to this philosophical controversy, I am puzzled as to what he does mean. To me, faith means assent to a proposition, not because of the intrinsic objective evidence of the proposition itself, but because of the extrinsic authority of the witness to the proposition. But faith itself supposes objective evidence of the existence, the competency, the veracity, and the testimony of the witness; and upon the objective evidence of these four things will depend the quality of the assent to the testified proposition. Therefore objective evidence is always the *ultimate* criterion of truth and the *ultimate* motive of certitude. Natural law principles are not offered on the authority of anybody. They stand or fall on their own intrinsic and objective evidence. Professor Goble's recurrence to "faith" seems to stem from his desire to uphold principles which cannot be proved from positive science. That they cannot be "proved" from positive science, I agree. But I cannot agree that there is no objective evidence outside of positive science. I would have to take that proposition on "faith" from Professor Goble. But I cannot, because it is immediately and objectively evident that, despite what I positively do, I "*should*" do good and avoid evil. If Professor Goble does not "know" this, but only "believes" it, on whose authority does he believe it, and why does he accept that authority?

4. Professor Goble states that principles of natural law, rules of positive science, and apparently all judgments, are "subjective"

³⁷ Goble, *supra* note 36, at 232.

and have "no existence except in the mind":

Basic to much that has been advanced in this discussion is the view that a rule has no objective existence in any other form than as a group of spoken or written words, that is, as a symbol. The idea or *judgment* which the words symbolize is the important thing, and it has *no existence except in the mind*. The rule is therefore *subjective* and not objective. . . . Of course, conduct which results from knowledge of the rule is objective, but conduct in compliance with a rule, can hardly be said to be the rule itself.³⁸ (*Italics supplied.*)

With the statement that judgments are more important than the words which symbolize them, I agree; and I regret that Professor Goble gave such importance to the four symbols, "Thou shalt not kill," that he missed the meaning of the principle which they symbolize. Accordingly, despite the symbols used above, I do not think that Professor Goble is a philosophical subjectivist. He agrees with the scholastic position that objective reality exists independently of an act of the mind, that the mind "cannot create knowledge," that the mind "cannot think in a vacuum," that the mind cannot "reason without experience," and that the positive sciences, at least, depend upon "objective evidence." Why, then, does he say that judgments are "subjective" and have "no existence except in the mind"? Judgments are acts of the intellect purporting to represent objective reality. Precisely *as vital acts* of the intellect, they are all, of course, subjective. But from the standpoint of human knowledge and all sciences they have a much more important aspect: they are purported representations of reality outside the act and independent of it. False judgments (men are birds), chimerical ideas (square circles), figments of the imagination

(winged horses) and the like, do not represent objective reality existing independently of the act which elicits them; they are purely subjective, therefore, both as acts and as representations. But true judgments (men are not birds, they are rational animals) *do represent* objective reality existing independently of the act which elicits them. Hence, *as representations*, they are reasonably, and more appropriately, called "objective." Similarly, the reality which objective judgments represent is reasonably and appropriately called "objective truth." It is essential to have a criterion of truth and error; it is appropriate to have significant terminology to separate the two. And "objective evidence," "objective truth," "objective judgments" square with the ordinary uses of language, *e.g.*, "Pay no attention, *it is just in his mind.*"

5. Professor Goble seems to believe that adherence to the fundamental principles of the natural law would hobble the pursuit of truth and handicap the search for a better society and a more efficient administration of justice. He asserts:

It appears that Father Kenealy believes that fundamental principles should not yield to man's broader knowledge or deeper insights, because he is sure that the fundamental principles man now has are "certain, universal and immutable" and therefore perfect, and incapable of improvement. This proposition I find myself unable to accept. . . . It is my belief that in the search for truth the mind should not be shackled by unverifiable rules.³⁹

It is quite correct and logical to say that the scholastic position is that "man's broader knowledge or deeper insights" will never prove that men should do evil and avoid good, or kill one another unjustly, or be indifferent to either; just as the same broader

³⁸ Goble, *supra* note 36, at 234.

³⁹ Goble, *supra* note 36, at 235, 236.

knowledge or deeper insights will never prove that things can be and not be at the same time under the same aspect, that things can exist without a sufficient reason, that contingent things can exist without a cause, that objective reality does not exist independently of an act of the human intellect, that the mind can know nothing, that there is no difference between truth and error, between certitude and probability, etc. Far from shackling the mind in its pursuit of truth, these are the immediately and objectively evident premises indispensable to the pursuit of truth and the advance of human knowledge. But they do not dispense with the necessity for the pursuit or the hope of the advance. Therefore I had said:

The construction and maintenance of a *corpus juris* adequately implementing the natural law is a monumental and perpetual task demanding the constant devotion of the best brains and the most mature scholarship of the legal profession. For the fundamental principles of the natural law, universal and immutable as the human nature from which they derive, require rational application to the constantly changing political, economic and social conditions of civil society. The application of the natural law postulates change as the circumstances of human existence change. It repudiates a naive and smug

complacency in the *status quo*. It demands a reasoned acceptance of the good, and a rejection of the bad, in all that is new. It commands a critical search for the better. It requires an exhaustive scrutiny of all the available data of history, politics, economics, sociology, psychology, philosophy, and every other pertinent font of human knowledge. Of primary importance, it insists that the search for a better *corpus juris* be made in the light of the origin, nature, dignity and destiny of man; and in the knowledge of the origin, nature, purpose and limitations of the state.⁴⁰

This is a blueprint for pursuit, not a shackle to search. Moreover it is a liberation of the ethical and legal mind from the limited confinement of purely positive science. Hence, the distinction and reply which I made in the beginning of this essay to Professor Goble's dilemma.

In conclusion I am happy to record my appreciation of the cordial spirit and scholarly manner in which Professor Goble has responded to my criticism of his original article. We both seek the truth. And we seek it with the disadvantage of discordant terminology. But we seek it also with the important advantage of mutual respect and friendship.

⁴⁰ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 260 (July 1956).